

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JERRY BOWEN AND CHERYL BOWEN

APPELLANTS

V.

CAUSE NO. 2015-CA-00184-COA

**AMORY HMA, LLC D/B/A GILMORE
MEMORIAL REGIONAL MEDICAL CENTER
AND PATRICK ANDERSON MURPHREE, M.D.**

APPELLEES

APPELLANTS' MOTION FOR REHEARING

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ATTORNEY FOR APPELLANTS

1. DR. MURPHREE’S INTERROGATORY RESPONSES STIPULATE THE REQUIREMENT OF INFORMING JERRY BOWEN THAT SURGERY COULD BE PERFORMED WITH GENERAL ANESTHESIA ONLY.

The purpose of requiring expert testimony in informed consent cases is “to assist the finder of fact in determining whether a particular risk is material, requiring disclosure to the patient prior to a medical procedure.” Whittington v. Mason, 905 So.2d 1261, 1266 (Miss.2005). Mississippi law requires disclosure of “feasible treatment alternatives” in order to obtain informed consent. Herrington v. Spell, 692, So.2d 93, 99-100 (Miss.1997), *overruled on other grounds by* Whittington, 905 So.2d 1261 (Miss.2005). Herrington provides six (6) items required in disclosure in order to obtain informed consent, however, “feasible treatment alternatives” is the only pertinent item in this case. Herrington, 692 So.2d at 99-100.

Dr. Murphree states in his response to Interrogatory No. 2, “I was required to . . . disclose material known risks,” which is required by Mississippi law. As stated above Mississippi law also requires disclosure of “feasible treatment alternatives” which Dr. Murphree provides in his response to Interrogatory No. 3: “An alternative would be to use only general (anesthesia).” Dr. Murphree has clearly provided his duty/standard of care for obtaining informed consent which is informing Jerry Bowen that the surgery could be performed with general anesthesia only. There is no further need to “assist the finder of fact,” therefore, no need for expert testimony.

Appellant concedes that in the vast majority of cases expert testimony would be crucial and needed in explaining the standard of care in an informed consent case. This Court’s opinion focuses on the requirement of expert testimony to explain the material risks. However, this case is unique in that disclosure of “material known risks” is not the important issue; the paramount issue in this case is disclosure of “feasible treatment alternatives.” Dr. Murphree succinctly states “An alternative would be to use general (anesthesia).” Even if Jerry Bowen had been

adequately informed of the risks associated with an interscalene block, he is still entitled to know treatment alternatives available in order to provide informed consent. As stated in Appellant's Brief, "Jerry Bowen would not have agreed to both the interscalene block and general anesthesia had he been informed of the risks and feasible alternatives."

2. APPELLANTS DESIGNATED DR. TURBA AS AN EXPERT WITNESS ON TWO SEPARATE OCCASSIONS.

Appellants' first designated Dr. Turba as an expert on November 23, 2010, in response to Amory HMA's First Set of Interrogatories to Plaintiff. Interrogatory No. 12 states:

Identify each person whom you intend to call as an expert witness in the trial of this cause and state the subject matter upon which each is expected to testify, the substance of the facts and opinions of each, the basis for each opinion, including the identity of every document, medical record or text on which they rely, and a summary of the grounds for each.

Appellants' responded, in pertinent part, as follows:

Plaintiff may call any of this treating physicians to give testimony regarding causation and damages. Dr. Turba, Dr. Bobo and Dr. Muhlbauer are all expected to testify that the interscalene block administered by Dr. Murphree caused Jerry Bowen to suffer a brachial plexus injury. Dr. Turba, Bobo and Muhlbauer are also expected to testify as to Plaintiff's brachial plexus injury caused him to suffer pain and suffering, loss of use of his upper extremity, mental depression, and other physical damages. Plaintiff reserved the right to supplement this interrogatory. (See **Exhibit A** attached hereto).

Then on June 3, 2014, Appellants' provided the Appellees' with **Exhibit B** (attached hereto) *Plaintiffs' Designation of Expert Witnesses*, naming Dr. Turba, among other doctors, as expert witnesses in this case. (R. 104-105). The designation of Dr. Turba provided Appellees' with the following information:

John Edward Turba, M.D.
King's Daughters Medical Center
427 Highway 51 North
Brookhaven, Mississippi

Dr. Turba is a licensed physician board certified in the field of orthopaedic surgery. Additionally Dr. Turba is a member of the American Academy of Orthopaedic Surgery and the American Orthopaedic Society of Sports Medicine. Dr. Turba has given testimony in this cause via video

and transcribed deposition at the instance of the Plaintiff. Dr. Turba is expected to testify at trial regarding any/all matter discussed during his deposition, including but not limited to, the following:

1. Dr. Turba vs. Dr. Murphree's responsibilities regarding informed consent, verbal and written;
2. Knowledge of the pertinent anatomy;
3. Causation of injury to Jerry Bowen's brachial plexus;
4. Pain and limitations Jerry Bowen has suffered as a result of injury to his brachial plexus;
5. Disability/inability to continue employment following December 6, 2007 surgery;
6. The lack of medical necessity for Jerry Bowen to undergo both general anesthesia and interscalene block.

Dr. Turba is expected to testify that Dr. Murphree failed to obtain proper informed consent from Jerry Bowen prior to the interscalene block. Dr. Turba is expected to testify that the interscalene block administered by Dr. Murphree caused or contributed to Jerry Bowen suffering a brachial plexus injury. Dr. Turba is expected to testify that the rotator cuff surgery could have been performed without the interscalene block, and that Dr. Turba no longer performs rotator cuff surgery with both general anesthesia and interscalene block. Dr. Turba is expected to testify that Jerry Bowen has experienced and will continue to experience immense pain and loss of use of his arm as a direct result of the brachial plexus injury. Dr. Turba is expected to testify that Jerry Bowen has been unable to return to work since his brachial plexus injury on December 6, 2007.

Dr. Turba's opinions are based on his education and vast experience as a practicing orthopaedic surgeon, along with his personal treatment of Jerry Bowen and referrals to other physicians such as Dr. Bobo and Dr. Muhlbauer.

Appellees were no doubt aware of Plaintiff's designation of Dr. Turba. Dr. Murphree filed a *Motion in Limine*, on October 20, 2014, to exclude Dr. Turba from testifying to subsequent remedial measures. Additionally, in the June 3, 2014, *Plaintiffs' Designation of Expert Witnesses*, Plaintiffs also designated Jennifer Tyra as an expert economist for proving economic damages. Appellees later filed a *Motion in Limine* to exclude the expert testimony of Jennifer Tyra (R. 173-174) and referenced her disclosed opinion (from Plaintiffs' Designation of Expert Witnesses) as an exhibit attached to said motion. However, the *Motion in Limine* filed with the Court did not have *Plaintiffs' Designation of Expert Witnesses* attached.

WHEREFORE, PREMISES CONSIDERED, Appellants respectfully request this Court to grant their Motion for Rehearing and to enter an order reversing the Trial Court's opinion and remanding this case for trial.

Respectfully submitted, this the 28th day of June, 2016.

/s/ Ned McDoanld III

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ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I, Ned McDonald III, attorney for the Appellants in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of Appellants' Motion for Rehearing to all counsel of record and the Trial Court Judge by the MEC system or by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

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Judge Jim S. Pounds
P.O. Box 316
Booneville, Mississippi 38829

This the 28th day of June, 2016.

/s/ Ned McDonald III

CERTIFICATE OF FILING

I, Ned McDonald III, attorney for the Appellants in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the Appellants' Motion for Rehearing via the Court's MEC e-filing system.

This the 28th day of June, 2016.

/s/ Ned McDonald III